IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 63 OF 2001

Shri Karim Khan Yakub
Khan, major, resident
of Narayan-Nagar,
House No.178/42,
Honda, Sattari, Goa. ... Appellant.

versus

1. Shri Shamsuddin Khatib,
major, resident of
Gadel(Galel), Banda,
(House Number not known)
Taluka Sawantwadi,
Sindhudurg(Maharashtra). ... Respondent.

2. State

Mr. S. D. Lotlikar, Senior Advocate with Miss S.Dessai, Advocate for the Appellant.

Mr. Joseph Vaz, Advocate for Respondent No.1.

Mr. S. N. Sardessai, Public Prosecutor for the State/ Respondent No.2.

CORAM: P. V. HARDAS, J.

DATED: 25TH SEPTEMBER,2003.

ORAL JUDGMENT

The Appellant/Complainant being aggrieved by

the Judgment of the learned Judicial Magistrate First Class, Bicholim, dated 30th April, 2001, in Criminal Case No.18/OA/98/A, acquitting the Respondent/Accused for an offence punishable under Section 138 of the Negotiable Instrument Act, 1881, has filed the present Appeal challenging the said acquittal.

2. The facts in brief as are germane for the decision of this Appeal are set out hereunder:-

The Appellant/Complainant filed a complaint before the learned Judicial Magistrate First Class, Bicholim which was registered as Criminal Case No.18/OA/98/A for an offence punishable under Section 138 of the Negotiable Instrument Act, 1881. The allegation of the Appellant/Complainant was that towards the debt/liability, the Respondent/Accused had issued a cheque dated 26th May, 1998 for an amount of Rs.78,000/- which had been returned unpaid because of insufficiency of funds in the account of the Respondent/Accused. A notice at Exh.PW1/C colly. came to be issued to the Respondent/Accused. Exh.PW1/D is the postal envelope which bears the endorsement of the postman that it was being returned as "unclaimed". The Complainant examined himself as P.W.1 and deposed about the issuance of the cheque and its bouncing. The Complainant has been cross-examined by the Respondent/Accused. The

Complainant also examined P.W.2, Suryakant Samant, Manager of State Bank of India, Bicholim Branch. The Respondent/Accused did not examine himself as a witness.

3. During the course of the hearing, it was pointed out to me by Mr. S. D. Lotlikar, learned Senior Counsel appearing for the Appellant/Complainant that the learned Judicial Magistrate had dispensed with the recording of the statement under Section 313 of the Code of Criminal Procedure on the ground that there were no incriminating circumstances appearing against the Respondent/Accused. On perusal of the roznama, it is seen that the roznama dated 9th April, 2001 records that "since there were no incriminating circumstances against the Accused covering ingredients of Section 138 of N.I.A. hence matter fixed for argument on 16-4-2001".

4. Perusal of the evidence of the Complainant,P.W.1, Karim Khan and the evidence of P.W.2, Suryakant Samant, it is apparent that this was not a case of no evidence and the learned Judicial Magistrate ought to have examined the Respondent/Accused under Section 313 of the Code of Criminal Procedure by putting circumstances adverse to him. In the absence of that, there cannot be any effective adjudication about the guilt or innocence of the Respondent/Accused in the present Appeal.

5. In the result, the Appeal is allowed. The impugned Judgment acquitting the Respondent/Accused is hereby quashed and set aside and the matter is remitted back to the learned Trial Court for recording the statement of the Respondent/Accused under Section 313 of the Code of Criminal Procedure and after hearing the Complainant and the Accused to pass Judgment according to law.

6. It is needless to add that after recording the statement under Section 313 of the Code of Criminal Procedure, the Respondent/Accused if he wishes to examine himself or any other witnesses in support of his defence shall be permitted to do so.

7. With the aforesaid observation, Criminal Appeal is allowed and the matter is remitted back to the learned Trial Court for decision afresh.

P. V. HARDAS, J.

RD.